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Supreme Court of the United States

October Term, 1950
No. [redacted] 50

CANADIAN AVIATOR LTD.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

and

H. JASON JONES, et al.,
Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Canadian Aviator, Ltd., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on February 7, 1951. Petition for rehearing was denied on February 26, 1951.

Summary Statement of the Matter Involved

Petitioner's steamship CAVELIER and respondent's steamship JOSEPH STANTON collided in New York Harbor on January 9, 1943. Petitioner filed a libel, both as ship-owner and as bailee of the CAVELIER's cargo, under the Suits in Admiralty Act, 46 U. S. Code §§ 741 *et seq.*, and respondent filed a cross libel (R. 3, 11). The suits were consolidated and tried in the District for Southern New

York before Clancy, J. who found both vessels at fault. His decree ordered that petitioner recover "one-half of the damages sustained by it by reason of the matters and things alleged in the libel, together with interest thereon" and that respondent recover similarly (R. 31). Respondent appealed, but on the merits only, raising no question of interest. The Circuit Court of Appeals affirmed *per curiam*, 154 F. 2d 825. The District Court's interlocutory decree entered on the Circuit Court's mandate likewise adjudged that both petitioner and respondent recover "one-half of the damages sustained by it * * * together with interest thereon * * *" (R. 36).

Thereafter H. Jason Jones, *et al.*, owners of some of the CAVALIER's cargo, intervened and subsequently all parties' damages were stipulated (R. 19, 37-46). Cargo claims were stipulated to bear interest on physical damage from a date three weeks after the collision, and on general average contributions from the date on which these were paid. Petitioner and respondent stipulated dates from which interest on the individual items of their damages would run if allowed, those dates being fixed as the dates on which items of out-of-pocket expenses (e.g. damage repair bills) were actually paid. To respondent's damages were added the amounts, including interest, that it was adjudged to pay to cargo, and from petitioner's damages were subtracted the general average contributions paid to it by cargo, and interest thereon. These figures, which included throughout interest at 4% to both vessels, were proposed to be used as the basis of the final decree. Respondent, however, reserved two questions on its stipulation, viz. (1) whether any interest could be awarded prior to final decree, and (2) whether it was entitled to interest at 6% although petitioner was limited to interest at 4% (R. 39). These issues were raised on the settlement of the final decree. The District Court, Rifkind, J., allowed interest from the agreed dates—to petitioner at 4%, the

Suits in Admiralty Act rate, but to respondent at 6% (R. 63). 1950 A. M. C. 328. From this inequality Canadian Aviator appealed (R. 67, 69). Later respondent appealed, contending that no interest should have been allowed prior to final decree (R. 70-72).

The Court of Appeals held that interest could not be allowed to either party prior to decree, but allowed pre-decree interest to cargo (R. 75). 187 F. 2d 100. Petitioner's appeal as to the inequality of the award of pre-decree interest (6% to respondent, 4% to petitioner) was not mentioned.

Appendix A, *infra*, pp. 24-25, illustrates with reference to one item of petitioner's damages and one item of respondent's damages how petitioner claims interest should be dealt with in striking the balance and how the Circuit Court directed it be done.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on February 7, 1951. Petitioner filed a timely petition for rehearing on February 20, 1951, which was denied on February 26, 1951. The jurisdiction of this Court is invoked under § 1254 of Title 28, United States Code.

Questions Presented

1. Whether in both-to-blame collision cases interest is discretionary or must, as a matter of law, be denied until the balance is struck upon the entry of the final decree.

2. Whether in a both-to-blame collision arising under the Suits in Admiralty Act, the United States is of right entitled to interest at 6% although the private party is limited to 4%.

Statute Involved

The Suits in Admiralty Act controls. 46 U. S. C. §§ 741 *et seq.* (Act of March 9, 1920, 41 Stat. 525). Its pertinent provisions are:

> "3. Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. * * *"

Specification of Errors

The Court of Appeals erred:

1. In holding as matter of law that in both-to-blame collision cases in admiralty no interest can be allowed prior to final decree.

2. In failing to hold that in both-to-blame collision cases in admiralty involving a private vessel and a merchant vessel of the United States, interest should be calculated at the same rate, 4%, to both vessels.

Reasons for Granting the Writ

PART ONE—AS TO THE ALLOWANCE OF ANY INTEREST

I. The decision of the Court of Appeals is in conflict with the decisions of this Court in two respects:

a. In holding that interest is not discretionary.

The Court of Appeals squarely held that interest prior to final decree must be denied in all both-to-blame cases. It said:

> "It [The Wright, 109 F. 2d 699] decided that as interest is withheld in collisions between private vessels until it can be found which party is withholding a balance, it should all the more be denied the United States in cases where the latter is the party liable for the balance and where there has never been any withholding by the other party. Accordingly, in the present 'both to blame' situation, *interest may not be allowed prior to final decree* and the decree below should be modified so as to eliminate all interest to either party prior to its date" (R.77; italics ours).

When the question was raised in the District Court the parties submitted affidavits which dealt with the equities, the withholding of balances, etc. (R. 50-61). Rifkind, J. passed the point, feeling constrained by the prior decree of the Circuit Court which had allowed interest (R. 63). The Circuit Court, as appears from the language just quoted, gave no consideration to the facts or the equities but, deeming the point controlled by its prior decision in *The Wright*, 109 F. 2d 699, disposed of the matter entirely as a question of law.

It has long been the rule in this Court that the allowance of interest in collision cases is a matter of sound legal dis-

cretion. In *The Albert Dumois,* 177 U. S. 240, which was a both-to-blame collision case, this Court said:

> "The allowance of interest in admiralty cases is discretionary * * *" (p. 255).

See also *The Maggie J. Smith,* 123 U. S. 349, 356, and *The Scotland,* 118 U. S. 507.

If the Circuit Court had denied interest in the exercise of discretion this petition would not be filed.

Although interest is discretionary this Court has granted certiorari to decide an interest question where the Circuit Court has denied interest not as matter of discretion but as matter of law. *Boston Sand & Gravel Company* v. *United States,* 278 U. S. 41.

b. In holding that interest is not allowable.

The general rule as laid down by this Court is that a recovery for a maritime tort includes interest. *The Amiable Nancy,* 3 Wheat. 546, 560 (improper boarding by privateer). See *The Atlas,* 93 U. S. 302, 310, and *cf. The Santa Maria,* 10 Wheat. 431, 445-6; *Standard Oil Co.* v. *Southern Pacific Co.,* 268 U. S. 146, 155-6, 158.

Nothing in the decisions of this Court suggests that an exception should be made to the general rule of *restitutio in integrum* in cases of both-to-blame collisions. This Court held in *The North Star,* 106 U. S. 17, 18, a both-to-blame collision, that

> "Each vessel being liable for half the damage done to both, if one suffered more than the other, the difference should be equally divided and the one which suffered least should be decreed to pay one-half of such difference to the one which suffered most, so as to equalize the burden."

That holding was stated only in general terms. But five years later, in *The Manitoba,* 122 U. S. 97, the problem of

making such a computation was considered in detail. After restating the rule of *The North Star* this Court said (122 U. S. at 111):

> "Applying this rule to the present case, the amount of the aggregate damage to both vessels, computed with interest to the date of the decree of the Circuit Court, was $93,288.16; being for the Comet, $85,818.16 and for the Manitoba $7,470.00. One-half of this was $46,644.08. The loss of the owners of the Comet and the cargo and pending freight was greater than that of the owners of the Manitoba by the sum of $78,348.16. One-half of that difference was $39,174.08. That was the amount of the liability of the Manitoba to the Comet, at the date of the decree of the Circuit Court on a division of the damages, after a proper allowance to the Manitoba for the damage to her, and without reference to the limitation of liability."

The interest thus awarded to both shipowners was "at six per cent per annum from the date of the collision" (122 U. S. at 110).

Appendix A, *infra*, pp. 24-25, compares the manner in which this Court allowed interest in *The Manitoba* with both the method of calculation contended for by petitioner in this case and the method employed by the Circuit Court.

The Manitoba, which is the only case in which this Court has ruled on the proper calculation of a both-to-blame decree, has since been accepted by bench and bar as intending the allowance of pre-decree interest without distinction between single and mutual fault cases. *Galveston Towing Co.* v. *Cuban S.S. Co.*, 195 Fed. 711, 713 (C. C. A. 5); *Managua Nav. Co.* v. *Aktieselskabet Borgestad*, 7 F. (2d) 990, 993 (C. C. A. 5); *Kawasaki Zoshensho* v. *Cosulich Societa Triestina di Navigazione*, 11 F. (2d) 836, 838 (C. C. A. 5); *The Hannah A. Lennen*, 77 F. Supp. 471, 472-473 (D. C. Del.); *Spencer on Marine Collisions* 377.

Moreover, the question has been before this Court once again since *The Manitoba* was decided. *Boston Sand & Gravel Company* v. *United States,* 278 U. S. 41, was a suit against the United States under a private Act. Both vessels were held at fault and the private shipowner claimed interest. The Circuit Court denied interest on the narrow ground that the private Act did not permit interest against the sovereign. This Court granted certiorari but confined its decision to the narrow ground that the private Act did not permit interest against the sovereign whatever the rule might be otherwise. However, Mr. Justice Sutherland dissented and Mr. Justice Butler, Mr. Justice Sanford and Mr. Justice Stone concurred in his dissenting opinion, in which he said:

> "In collision cases between private parties, interest, as a general rule, is allowed upon the amount of the loss sustained. That the allowance may be to some extent in the discretion of the court does not affect the question presented here, since the court below denied interest not as a matter of discretion but upon the ground that it had no power to allow it against the United States. From an examination of the record, it fairly may be assumed that if the case had been one between private parties interest would have been allowed.
>
> It is said that when interest is allowed it is no part of the damages. But, very clearly, I think, the settled rule is to the contrary" (pp. 49-50).

It seems clear that this Court would have allowed pre-decree interest in that both-to-blame case had it not felt constrained by the language of the private Act authorizing suit against the sovereign.

II. The decision of the Court of Appeals is in conflict with the decisions and practice of other circuits, and with its own.

a. In holding that interest is not discretionary.

Every other maritime circuit, and the Second Circuit in its previous opinions, has held that the award of interest on collision damages lies in the discretion of the Court. *Eastern S. S. Corp.* v. *Great Lakes Dredge & D. Co.*, 256 Fed. 497, 505 (C. C. A. 1); *The Wright*, 109 F. 2d 699, 702 (C. C. A. 2); *The Manhattan*, 85 F. 2d 427 (C. C. A. 3); *The Mary B. Curtis*, 250 Fed. 9, 18 (C. C. A. 5); *Cambria S. S. Co.* v. *Pittsburgh S. S. Co.*, 212 Fed. 674 (C. C. A. 6); *The President Madison*, 91 F. 2d 835, 847 (C. C. A. 9). But the Court below decided this case not as a matter of legal discretion but as one of legal constraint.

b. In holding that interest is not allowable.

Since the earliest days of our admiralty jurisdiction it has been universal practice to allow interest in single fault collision cases from the date(s) on which the damages were sustained, i.e., in total loss cases, generally from the date of the collision; in partial loss cases, generally from the dates on which the several items of expense were incurred or paid.

> "Interest is necessary to make 'just compensation' for the loss of a vessel or the repairs, salvage expenditures, and the like, caused by the tort of the colliding offender—that is, to make * * * restitutio in integrum * * *." (*The President Madison*, 91 F. (2d) 835, 846 (C. C. A. 9).)

> "As the party responsible for the damages resulting from the collision became liable when it occurred, interest on the amount of such damages, if not then paid, was allowable from that date." *The El Monte*, 252 Fed. 59, 64 (C. C. A. 5).

"Complete restoration required the payment of interest." *Eastern S.S. Corp.* v. *Great Lakes Dredge & D. Co.*, 256 Fed. 497, 505 (C. C. A. 1).

"• • • The award [of interest] is to be made whenever damages lawfully due are withheld, unless there are exceptional circumstances to justify the refusal." *The Wright*, 109 F. (2d) 699, 702 (C. C. A. 2).

The volume of cases so holding*, and the paucity of decisions to the contrary, make it clear that pre-decree interest is the rule in single fault collisions in every maritime circuit. The same rule has been applied in both-to-blame cases except in a few cases where, on unusual facts, the Courts have exercised discretion to the contrary.

In the Fifth Circuit, the notion that pre-decree interest should be denied in mutual fault cases apparently originated

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* Interest from the date of collision was awarded in *The Mary Eveline*, F. C. 9212 (CC NY); *The Morning Star*, F. C. 9817 (DC Ind.); *The North America*, 24 F. 2d 846 (DC NY); *The J. G. Gilchrist*, 173 Fed. 666, aff. 183 Fed. 105 (CCA 2); *Galveston Towing Co.* v. *Cuban S. S. Co. Ltd.*, 195 Fed. 711 (CCA 5); *The El Monte*, 252 Fed. 59 (CCA 5); *Managua Nav. Co.* v. *Aktieselskabet Borgestad*, 7 F. 2d 990, 993 (CCA 5); *The Eglantine*, 38 F. Supp. 658 (D. C. La.), reversed on other grounds 127 F. 2d 569 (CCA 5), 317 U. S. 395; *The Hannah A. Lennen*, 77 F. Supp. 471 (DC Del.); *O'Brien Bros., Inc.* v. *The Helen B. Moran, et al.*, 160 F. 2d 502, 506 (CCA 2); *The Cushing*, 285 Fed. 617, 622 (DC NY), modified 292 Fed. 560 (CCA 2), aff. 268 U. S. 146, 158, *sub nom. Standard Oil Co.* v. *Southern Pac. Co.; The Illinois*, 84 Fed. 697 (D. C. Pa.), aff'd. 87 Fed. 574 (CCA 3).

Interest from the date on which the repair, etc., bills were paid was awarded in *The America* F. C. No. 285 (CC NY); *The Huguenots*, F. C. No. 10,330 (DC NY); *The Sitka*, 156 Fed. 427 (DC NY), aff. 159 Fed. 1023 (CCA 2); *In Re Great Lakes Dredge & Dock Co.*, 250 Fed. 916 (DC Mass.), affirmed *sub nom Eastern S. S. Corp.* v. *Great Lakes Dredge & D. Co.*, 256 F. 497 (CCA 1); *The President Madison*, 91 F. 2d 835, 845 (CCA 9).

in the opinion of Speer, D. J. in *The Itasca,* 117 Fed. 885, 892 (S. D., Ga.), which contains neither reason nor authority. No appeal was taken, consequently the matter did not reach the Circuit Court until 1926. In *Kawasaki Zosensho* v. *Cosulich Societa Triestina di Navigazione,* 11 F. (2d) 836, certiorari denied 265 U. S. 581, the contention was again advanced. The Court of Appeals rejected it, saying, at p. 838:

> "The general rule is to allow interest from the date of the collision,"

for which proposition it cited *The Manitoba, supra,* a mutual fault collision. However, exercising its sound legal discretion, it disallowed interest but only because of the peculiar uncertainty of the damages and the exaggeration of libellant's claim.

In the Third Circuit, the question has not reached the Court of Appeals, but the District Court of Delaware has squarely held interest allowable in both-to-blame cases. *The Hannah A. Lennen,* 77 F. Supp. 471. The Court said:

> "The damage to the present libelant occurred at the date of collision * * *. The libelant is not fully compensated for the damage assessed against the respondent by the mere payment now of one-half the loss occurring on June 16, 1944, but to it must be added an additional damage, computed in the manner of interest * * *" (p. 473).

The Court of Appeals, Third Circuit, would most likely affirm this doctrine. Its general views on the theory of interest are expressed in *The Manhattan,* 85 F. 2d 427, 429 (C. C. A. 3).

In the First Circuit, research has disclosed no case in which it has ever been contended that a rule different from that applicable to sole fault cases governs mutual fault collisions. On the contrary one case has held and another

suggested that interest is allowable in both-to-blame cases as in sole fault cases.

In *The Rabboni*, 53 Fed. 952 (C. C.), reversed on other grounds 81 Fed. 239, a both-to-blame collision, the Court said, at p. 957,

> "When not more than the value of the vessel and pending freight is given, interest should justly be added, to make complete restitution. Therefore, in computing the damages, the commissioner will take, as those suffered by the Rabboni, the value of the vessel, $3,600. and the net pending freight, with interest, both to be computed by the rule given in Marsden * on Collisions, (3rd Ed. p. 111, 112). I give him no special directions for estimating the damages suffered by the Rumball, except to make corresponding allowance of interest."

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* The reference to the text cited is as follows:

"The general rule was thus stated by Dr. Lushington in *The Clarence*: 'The party who has sustained a damage by collision is entitled to be put, as far as practicable, in the same condition as if the injury had not been suffered.' This appears to be the meaning of the phrase used in some of the cases that the sufferer is entitled to *restitutio in integrum.* * * *

"If the ship is totally lost the owner is entitled to recover her market value at the time of the collision *with interest from the day of the collision* if the ship was not earning freight. If she was earning freight he is entitled to the estimated value of the ship at the end of her voyage, together with the freight she would have earned, less the cost of completing the voyage, *and interest on the whole from the probable end of the voyage.* If payment is made before that time an allowance is made for discount. *If, however, the plaintiff's loss exceeds the amount of the defendant's statutory liability, interest runs from the date of the collision, whether freight was being earned or not.*

The Admiralty practice as to allowing interest on damages applies to common law actions which, before the Judicature Acts, the Admiralty Court had not, but which the Admiralty Division has, jurisdiction to entertain; also to actions transferred by consent to the Admiralty Division" (italics ours).

The second decision was *The H. F. Dimock,* 77 Fed. 226 (C. C. A. 1, 1896). The DIMOCK, a small steamship, had sunk the ALVA, a yacht found to have been worth $191,500, in a mutual fault collision. The Court found that the ALVA was a total loss, but permitted the DIMOCK to limit liability to $92,000. As to the computation of the ALVA's damages, it was said, at p. 236,

> "It is true that in insurance the rule is one of indemnity, but it cannot be said to be less in cases of collision. The rule here is admittedly that of 'restitutio in integrum',"

of putting the owner of the ALVA

> " 'in the same condition as if the injury had not been suffered.' "

However, the Court continued, at p. 240,

> "We direct that no interest be cast on any of the claims allowed * * * "

not because this was a mutual fault collision but

> " * * * because, inasmuch as the value of the Dimock and her pending freight is insufficient to pay the principal of the claims, computation of interest would be a useless labor."

In the Second Circuit the usual rule prevailed until the present decision dignified as a principle of law an unnecessary and ill-considered dictum in *The Wright,* 109 F. (2d) 699, 702 (C. C. A. 2). This same Court had said, in *New York & Cuba Mail S.S. Co.* v. *United States,* 16 F. (2d) 945, 947, certiorari denied, 274 U. S. 753, with the question of interest in a both-to-blame case clearly in focus before it,

> "In a suit between private parties in admiralty growing out of collision, it has long been settled that interest is awarded as part of the measure of damages. The object of the award of damages is to

> place the injured party in the same pecuniary position as he would have been in but for the collision. * * *. Indemnity is not complete without interest. The Admiralty Courts in suits between private persons have always followed this rule. * * *"

To the same effect in the Second Circuit are *The Mahanoy,* 127 Fed. 733 (S. D. N. Y.) (which specifically rejected *The Itasca; The Comus,* 19 F. 2d 774, 777 (C. C. A. 2), and *The Cushing,* 285 Fed. 617 (S. D. N. Y.), modified 292 Fed. 560 (C. C. A. 2), affirmed *sub nom. Standard Oil Co.* v. *Southern Pac. Co.,* 268 U. S. 146.

In *The Wright, supra,* to which the Circuit Court refers as having already decided the point, the question did not and could not arise. That suit was under the Public Vessels Act which expressly denies interest to the private shipowner prior to final decree. In no event, therefore, could there have been an award of interest against the United States for "withholding a balance". The Court's dictum was therefore gratuitous. Moreover it was based upon inadequate research. A vast majority of the decisions on the interest question were not mentioned, e.g. *The Manitoba, supra,* 122 U. S. 97, and the Circuit Court's own previous decisions in *The Cushing,* 292 Fed. 560, and *New York & Cuba Mail S.S. Company* v. *United States,* 16 F. 2d 945. This is not surprising. The Court had no assistance from the Bar. The question not being in the case, it was neither briefed nor argued.

The net effect is that the Circuit Court has now "decided" a question of great general importance in conflict with the prior decisions of this Court, other Circuit Courts and its own prior decisions, without considering the question on the merits, upon the assumption that it had previously decided the question when it had not.

III. The decision of the Court of Appeals conflicts with the English authorities.

Since maritime commerce is largely international, and there has been a peculiar unity in the law governing that commerce, this Court has been vigilant since earliest times to forestall judge-made innovations that would unnecessarily have led the United States on an isolationist byway. *The Scotia,* 14 Wall. 170, 187, 188. It is therefore peculiarly appropriate that certiorari should be granted in admiralty cases where such a conflict appears. *Cf. Aetna Ins. Co.* v. *United Fruit Co.,* 304 U. S. 430, 434; *Queen Insurance Co.* v. *Globe & Rutgers Fire Ins. Co.,* 263 U. S. 487, 493; *Gulf Refining Co.* v. *Atlantic Mutual Ins. Co.,* 279 U. S. 708, 715.

Some diversity between the award of damages in an American court and in a British court necessarily follows from the British adoption of the Brussels Convention of 1910 * in cases where both vessels were at fault but in demonstrably different degree. However, where the fault was equal, or it cannot be established that there were different degrees of fault, the British, like us, divide the damages equally. In any case, whether of single fault, mutual equal fault or mutual but different fault, the British courts include pre-decree interest in their computation of damages, in order to effect a true "restitutio in integrum." Roscoe, *Measure of Damages in Actions of Maritime Collisions* (3rd ed. 1929), 1-7, 37-39; Marsden, *Collisions at Sea* (8th ed. by Gibb, 1923), 116-117, 144 fn. (i).

As early as 1827, the rule was assumed by Lord Stowell, sitting in the High Court of Admiralty. *The Dundee,* 2 Hagg. 137. Thereafter, Dr. Lushington, in the same court, applied the principle by awarding interest from the date of payment of the principal repair bill. *The Hebe,* 2 W. Rob. 530, 537, 5 N. of C. 182.

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* 1 & 2 Geo. V, Ch. 57.

In *Straker* v. *Hartland,* a limitation of liability proceeding, petitioners advanced the argument, similar to that of the Court of Appeals in the instant case, that "Our liability was not ascertained until after the decision of the Court of Admiralty." The Vice-Chancellor nonetheless followed the "settled rule of law" and awarded interest from the date of the collision. 2 Mar. L. C. 159, 160 (1864).

A fuller exposition of the principle was made by Sir R. Phillimore, sitting in the Court of Admiralty in *The Northumbria,* L. R. 3 A. & E. 6, 3 Mar. L. C. 314, another limitation proceeding. After mentioning common law decisions cited in opposition to the rule, the Court said, 3 Mar. L. C. at 315,

> "* * * It appears to me quite a sufficient answer to these authorities to say that the Admiralty Court, in the exercise of an equitable jurisdiction, has proceeded upon another and a different principle from that on which the common law authorities appear to be founded. The principle adopted by the Admiralty Court has been that of the civil law, that interest was always due to the obligee, when payment was not made, *ex morâ* of the obligor; and that, whether the obligation arose *ex contractu* or *ex delicto.*"

In *The Baron Aberdare,* 12 P. D. 205, 13 P. D. 105, the reorganization of the British courts by the Judicature Act of 1873 provided a new opportunity to attack the rule. The suit had been tried in the Queen's Bench Division, but transferred on consent to the Admiralty Division for the assessment of damages. The Court of Appeal held that the registrar of that Division had not erred in awarding interest from the time the injury occurred. Lord Esher, Master of the Rolls, echoing the view of the court below, added his opinion that the admiralty rule was more just than the common law rule, and pointed out that in *The Khedive* (*Stoomvaart Maatschappy Nederland* v. *Peninsular & Oriental Steam Navigation Company,* 7 App. Cas. 795,

803) Lord Selborne in the House of Lords had not disapproved the admiralty doctrine.

More recently, the rule has been stated and followed in *The Kong Magnus,* [1891] P. 223, 7 Asp. M. C. 64; *The Rosalind,* 5 Ll. L. Rep. 139, 175, 211, 212, 37 T. L. R. 116; *The Napier Star,* [1933] P. 136; 45 Ll. L. Rep. 139, 141, 142; and *The Seringa,* 77 Ll. L. Rep. 161, 361.

Not since 1888 (*The Baron Aberdare, supra*) has any attack been made on the rule itself, the efforts of litigants being confined to attempting to show peculiar equities to avoid the application of the general rule. Two of these suits were both-to-blame collisions—*Stoomvaart Maatschappy Nederland* v. *Peninsular & Oriental Steam Navigation Company, supra,* in the House of Lords, and *The Rosalind, supra,* in the Admiralty Division. Although both reports contain a thorough discussion of the rule, in neither was it contended by counsel or intimated by the courts that the general rule of allowing interest should be abrogated in mutual fault cases.

IV. The question presented is of major importance to the shipping industry.

It would be easy to deprecate the point raised by this petition as "merely a matter of interest". But this Court has previously granted certiorari to resolve an admiralty interest question in a matter of less general importance than this. In *Boston Sand & Gravel Company* v. *United States,* 278 U. S. 41, this Court granted certiorari to resolve a conflict between the First and Second Circuits on the question whether interest was recoverable against the United States in suits under private acts in collision cases.*

* If pre-decree interest were not generally allowable and allowed the question could not have arisen.

In that case certiorari was granted seven years after the enactment of the Suits in Admiralty Act, i.e. when the question of interpreting private acts had become practically moot because suits were no longer being brought under private acts, that practice having been superseded by the Suits in Admiralty Act, 1920, as to merchant vessels, and the Public Vessels Act, 1925, as to public vessels.

The decision below is of the widest application, applying to all both-to-blame collisions whether against the United States or between private parties. Over 200 collision cases involving private litigants alone reach the District Courts of the United States annually*, in addition to an unknown number of such suits to which the United States is a party.** The amount involved in these has never been calculated but the size and value of modern vessels, and high costs, make it seldom that the amounts involved are not large. The nature of such suits, the frequent necessity of seeking witnesses in far places, the crowded condition of admiralty

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* The Annual Reports of the Director of the Administrative Office of the United States Courts state that 222 collision cases involving private parties alone were begun in 1937, 245 in 1938, 208 in 1939, 201 in 1940, 218 in 1941, 210 in 1942, 225 in 1943, 287 in 1944, 269 in 1945, 243 in 1946, 227 in 1947, 244 in 1948, 302 in 1949, and 258 in 1950.

** Admiralty cases to which the United States is a party are separately stated in the Administrative Office Reports without segregation as to types. The U. S. was plaintiff in 85 and defendant in 51 admiralty cases commenced in 1937, 228 and 60 in 1938, 202 and 21 in 1939, 126 and 82 in 1940, a party to 36 in 1941 and 50 in 1942, 43 and 209 in 1943, 70 and 754 in 1944, 60 and 2021 in 1945, 82 and 2994 in 1946, 60 and 2951 in 1947, 55 and 1305 in 1948, 62 and 731 in 1949, and 69 and 470 in 1950. Pending Suits in Admiralty Act cases were said by the Attorney-General in his Annual Reports to total $12,041,579.98 in 1943 and $45,263,003.40 in 1944, $118,198,377.77 in 1945, $145,985,886.90 in 1946, $166,974,830.52 in 1947, and $183,682,226.71 in 1948.

calendars*, the settled practice of referring damage questions to a commissioner only after the merits have been adjudicated—all combine to cause collision cases to reach final decree seldom less than five years after the event. Therefore, approximately 30% of the aggregate damage in all both-to-blame cases, pending and future, turns upon the decision below, or its reversal. Substantially more than half of the collision cases are both-to-blame; hence it is easily understood why interest in such cases is a question of great importance to shipowners and their underwriters.

PART TWO—AS TO THE RATE OF INTEREST.

The District Court, finding itself "unable" to follow the Circuit Court's prior decision in *The Comus,* 19 F. 2d 774 and 1927 A. M. C. 1713 (C. C. A. 2), allowed the statutory 4% on petitioner's damages but 6% on respondent's damages. The opinion of the Circuit Court in *The Comus,* officially reported 19 F. 2d 774, was obscure on the interest question. Counsel on both sides sought and obtained an interpretation and the Court allowed 6% to both parties. 1927 A. M. C. 1713.

In the case at Bar the Circuit Court did not mention the rate of interest question.

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* In the Southern District of New York, which alone handles more than a quarter of all recently instituted admiralty suits, cases being tried today in regular turn joined issue early in 1949. The delay in the Eastern District of New York, second ranking in volume of admiralty litigation, is almost as great.

V. The decision below conflicts with principles well settled by this Court.

The rule in mutual fault collision cases is that the damages shall be borne equally. *The North Star,* 106 U. S. 17, 18; *The Atlas,* 93 U. S. 302, 313; Robinson on Admiralty, 1939, § 115, pp. 853 *et seq.*; Griffin on Collision, 1949, § 245, pp. 558 *et seq.*; 15 C. J. S., Collision, § 186 a, pp. 213-214.

To allow 6% to one, but only 4% to the other, of two ships mutually at fault is not to divide the damages equally.

So to divide the damages is likewise inequitable and therefore contrary to the admiralty practice as directed by the decisions of this Court. *Schoenamsgruber* v. *Hamburg American Line,* 294 U. S. 454, 457; *United States* v. *Cornell Steamboat Co.,* 202 U. S. 184, 194; *O'Brien* v. *Miller,* 168 U. S. 287, 297; *Watts* v. *Comars,* 115 U. S. 353, 361; *The Virgin,* 8 Pet. 538; cf. *Swift & Co.* v. *Compania Colombiana del Caribe,* 339 U. S. 684, 690.

Specifically, this Court pointed out in *James Shewan & Sons* v. *United States,* 266 U. S. 108, that in enacting the Suits in Admiralty Act the Congress was actuated by an "equitable purpose" (p. 112). That act provides:

> "Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties." Title 46, U. S. Code, § 743.

Between private parties in both-to-blame cases interest has always been allowed to both at the same rate in the absence of some peculiar equity, the possible existence of which in this case was not suggested either by counsel or by either Court below.

VI. The decision below conflicts with principles well settled by the Circuit and district courts.

It is everywhere held that the Admiralty Courts proceed upon equitable principles. *United Fruit Co.* v. *U. S.*, 186 F. 2d 890, 896 (C. C. A. 1); *Rice* v. *Charles Dreifus Co.*, 96 F. 2d 80, 83 (C. C. A. 2); *The S.S. Denny*, 40 F. Supp. 92, 98 (D. N. J.); *The Emma Giles*, 15 F. Supp. 502 (D. Md.); *Rubin Iron Works* v. *Johnson*, 100 F. 2d 871, 875 (C. C. A. 5); *The Kongo*, 155 F. 2d 492, 495 (C. C. A. 6); *Van Camp Sea Food Co.* v. *DiLeoa*, 171 F. 2d 454, 456 (C. C. A. 9).

This doctrine has been held directly applicable to questions of interest. *Cambria S.S. Co.* v. *Pittsburgh S.S. Co.*, 212 Fed. 674, 677 (C. C. A. 6); *The Smoky City*, 88 F. 2d 959 (C. C. A. 3); *The Salutation*, 37 F. 2d 337 (C. C. A. 2); *The Sovereign of the Seas*, 139 Fed. 812 (E. D. Va.).

The District Court's allowance of interest at 6% to respondent but only 4% to petitioner where the equities were equal was contrary to these principles.

VII. The decision below conflicts with prior decisions concerning equality in the allowance of interest.

The Comus, 19 F. 2d 774 (C. C. A. 2) was a suit against the United States. The District Court held both vessels at fault and allowed interest to both parties at 4%. Counsel found the Circuit Court's language in its officially reported opinion obscure and applied for an interpretation. In a letter to both counsel, not officially reported but reported at 1927 A. M. C. 1713, the Court said:

> "Answering your letter in reference to our decision of May 9th, 1927 asking what was intended by the opinion as to the modification of the interest, the members of the Court intend that interest shall be computed on the damages of each party at the rate of six percent (6%) per annum."

The Circuit Court went far indeed to achieve equity when it allowed interest to the private shipowner at 6% although the Suits in Admiralty Act limits interest to 4%.

In this case petitioner has not sought to recover interest at 6% but has sought to limit respondent's interest to 4%. Why the District Court was "unable to follow the subsequent action of the [Circuit] Court, reported at 1927 A. M. C. 1713" (Opinion R. 63) and equalize the rates at 4% does not appear.

In *The Wright*, 109 F. 2d 699 (C. C. A. 2), a both-to-blame collision case, the Court disallowed all interest to the United States to accomplish equality with the private shipowner because the latter was not entitled to any interest under the terms of the Public Vessels Act.

The District Court in Delaware resolved the same problem in the same way in *The Del-Mar-Va—Lst 389*, not officially reported, 1945 A. M. C. 1332, 1364.

In *The Commonwealth*, 297 Fed. 651 (S. D. N. Y.), to achieve equality interest was denied to the United States because the private shipowner was disentitled to interest under the terms of the private act pursuant to which suit was brought.

We find no prior decision anywhere allowing interest to the parties in a both-to-blame case at different rates.

VIII. The question is of general importance.

We have already referred to the large number of collision cases in which government vessels are involved—*supra*, p. 18. As Mr. Justice Rutledge pointed out in *Hust* v. *Moore-McCormack Lines, Inc.*, 328 U. S. 707:

> "• • • during most of the Second World War substantially our entire merchant marine became part of a single vast shipping pool, said to have been the

largest in history, operated and controlled by the United States through the War Shipping Administration. As of the date of Japanese surrender the War Shipping Administration operated or owned approximately 4300 merchant ships, as compared with 1375 ships available for deep-sea service in the pre-war American Merchant Marine'' (p. 709).

On June 30, 1949 government-owned tonnage had been reduced to 2195 vessels, of which 358 were active and 22 "temporarily inactive'', but even at this nadir these vessels constituted almost two-thirds of the total American fleet and more than 25% of the active ships. *United States Maritime Commission, Report to Congress, 1949* (1950), 1, 3, 62-3.

The Korean incident now tends to increase the size of the Government's merchant fleet.

The District Court's decision allowing different rates of interest will affect the result in every both-to-blame collision case in which a government merchant vessel is henceforth involved and the question should be determined by this Court for the guidance of the lower courts in all such litigation, pending and future.

Conclusion

WHEREFORE petitioner, Canadian Aviator Ltd., respectfully prays that a writ of certiorari be issued to review the decision and judgment herein of the United States Court of Appeals for the Second Circuit.

EUGENE UNDERWOOD,
Proctor for Petitioner,
27 William Street,
New York 5, N. Y.

Dated: May 3, 1951.

APPENDIX A

The method of striking the balance as contended for by petitioner and as determined by the Circuit Court are as stated below, using for purposes of illustration only the shipyard repair bill items (R. 44, 46):

AS CONTENDED FOR BY PETITIONER

Amount paid by CAVELIER to Todd Erie Basin Drydocks Inc.	$31,197.00	
Interest at 4% from March 4, 1943 to date of final decree	8,153.96	
Petitioner's direct repair cost plus interest ..		$39,350.96
Repairs to the JOSEPH STANTON ..	16,750.00	
Interest at 4% from March 17, 1943 to date of final decree	4,354.08	
Respondent's direct repair cost plus interest		21,104.08
Difference		18,246.88
Respondent pays petitioner one-half the difference		9,123.44*

AS DETERMINED BY THE CIRCUIT COURT

Amount paid by CAVELIER to Todd Erie Basin Drydocks Inc., without interest	31,197.00	
Repairs to the JOSEPH STANTON without interest	16,750.00	
Difference		14,447.00
Respondent pays petitioner one-half the difference		7,223.50*

* plus interest at 4% from the date of final decree until paid.

By way of comparison, this Court in *The Manitoba, supra,* 122 U. S. 97, affirmed the Circuit Court's decree which dealt with the damages, including interest, exactly as petitioner contends they should be dealt with in this case, as follows:

COMET's damages	$57,441.88	
Interest thereon from the date of the collision to the date of the Circuit Court's decree	28,376.28	
COMET's total damages		$85,818.16
MANITOBA's damages	5,000.00	
Interest thereon from the date of the collision to the date of the Circuit Court's decree	2,470.00	
MANITOBA's total damages		7,470.00
Difference		$78,348.16
MANITOBA's liability to COMET		$39,174.08

The last mentioned figure was not actually decreed against the MANITOBA, however, because she was held entitled to limitation of liability. See 122 U. S. pp. 109-111.

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 50

CANADIAN AVIATOR, LTD., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 62-63) is reported at 1950 A. M. C. 328. The opinion of the Court of Appeals (R. 75-76) is reported at 187 F. 2d 100.

JURISDICTION

The judgment of the Court of Appeals was entered on February 7, 1951 (R. 77). A petition for rehearing was denied on February 26, 1951 (R. 85). The petition for a writ of certiorari was filed on

May 5, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether in a both-to-blame collision case, where the damages are ordered divided, interest is allowable to either party for the period prior to the determination of each vessel's damages, the striking of a balance in favor of the vessel that sustained the greater damages, and the entry of a final decree in its favor.

STATUTES INVOLVED

Section 3 of the Suits in Admiralty Act of March 9, 1920, as amended (41 Stat. 526, 46 U. S. C. 743), is set forth in the Appendix, *infra,* pp. 16-17.

STATEMENT

This claim by petitioner, Canadian Aviator, Ltd., for additional interests arises out of a collision in New York Harbor on January 9, 1943, between its vessel, the *S. S. Cavelier,* and the *S. S. Stanton,* owned by the United States.

Petitioner filed a libel against the United States, alleging that the collision had resulted from negligent navigation on the part of the *Stanton* and had caused it damages "in the cost of repairs, detention, loss of and damage to cargo, and other items in the sum of about $125,000" (R. 5). In addition to filing an answer denying the material allegations of the libel, the United States, as owner of the *Stanton,* filed a cross-libel against the *Cavelier* and its owner, petitioner herein (R. 7-10; 11-14). The

cross-libel alleged negligent navigation on the part of the *Cavelier,* causing damages to the *Stanton* of approximately $35,000 (R. 13).

After trial, the district court entered an interlocutory decree holding both vessels at fault (R. 31). The decree (1) awarded petitioner judgment against the United States for one half of the damages sustained by petitioner together with interest thereon and (2) awarded the United States judgment against petitioner for one half of the damages sustained by the United States together with interest thereon (R. 31). The decree also referred the matter to a Commissioner to compute the amount of damages sustained by both parties (R. 32).

On appeal by the United States from the interlocutory decree holding that both vessels were at fault, the decree was affirmed by the Court of Appeals. 154 F. 2d 825.[1] The interlocutory decree on mandate, thereafter entered by the district court on May 3, 1946, contained the same language as the original interlocutory decree with respect to damages to both parties and interest thereon (R. 36).

Instead of reference to the Commissioner, the parties, on September 13, 1949, stipulated as to the various items of damage (R. 37-46): (1) The damage of petitioner, as owner of the *Cavelier,* was

[1] The sole question on that appeal was whether the district court properly found both vessels at fault. It was not then determined whether petitioner or the United States had sustained the greater damage and no question was then raised by the United States with respect to the interlocutory decree's allowance of interest.

stipulated at $118,316.54. This sum included interest in the amount of $26,538.86, covering the period from the date as to which each item of the damage was sustained up to the date of the damage stipulation.[2] (2) The damage of petitioner as bailee of cargo aboard the *Cavelier* was computed at $1,654.72, including interest prior to the date of the stipulation amounting to $259.43. (3) The damage of the United States as owner of the *Stanton* was stipulated at $21,302.08, including interest of $4,395.53 prior to the date of the stipulation. (4) The stipulation also fixed the agreed damages of H. Jason Jones & Company and other owners of other cargo aboard the *Cavelier* at $49,473.93, including interest of $9,984.12 (R. 38-39).[3]

The stipulation of damages expressly reserved the right of the United States to contend (1) that neither of the parties were "entitled to interest on its damages prior to final decree" (R. 39) and (2) that it was entitled to interest at 6 per cent against petitioner even though petitioner and the interven-

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[2] Most of these damage items, in connection with repairs, carried interest from the date of disbursement for the repairs. However, one of petitioner's largest items, unrepaired damage of $38,435.00, carried interest of $10,273.20 from January 9, 1943, the date of the collision (R. 45).

[3] These cargo owners are intervenors herein and were granted leave to file an intervening petition in the district court on December 16, 1947 (R. 19), almost five years after the collision. The damages payable to these cargo owners, as well as the damages payable to petitioner as cargo bailee, including the interest computed thereon, were added on to the damages assessed against the United States before a division of damages was made (R. 39, 65).

ing cargo owners were limited by the Suits in Admiralty Act to 4 per cent interest (R. 39).

The district court, however, refused to pass on the first contention—that no interest should be awarded to either party in a mutual fault collision case for the period prior to the date of final decree—on the ground that the language of the interlocutory decree on mandate allowing petitioner to recover one half of its damages from the United States *together with interest thereon,* "foreclose[d] the district court from reexamining the question" (R. 62). The court, adopting the Government's second contention, also ruled that interest computed prior to final decree may be allowed at 6 per cent in favor of the United States even though interest recoverable by petitioner against the United States prior to final decree, as well as thereafter, is limited to 4 per cent by the Suits in Admiralty Act (R. 62-63).

The district court entered its final decree on January 16, 1950, deducting the damages sustained by the United States, together with interest thereon prior to the decree, from the damages sustained by petitioner, together with interest thereon prior to the decree (R. 64-65). Judgment was allowed in favor of petitioner for one half of the difference, amounting to $21,996.40 (R. 65).[4] Petitioner was

[4] This figure, as well as all other computations in the final decree, allowed the parties additional interest for the period from September 13, 1949, the date of the stipulation, to January 16, 1950, the date of the final decree.

also allowed the sum of $1,673.51 for cargo of which it had been bailee, and the additional sum of $50.95, representing one half of the difference between its court costs and those of the United States. The total thus awarded to petitioner amounted to $23,720.86, together with interest at 4 per cent from the date of the final decree (R. 66).[5]

Petitioner appealed, contending that the United States should have been awarded only 4 per cent pre-final decree interest. The United States cross-appealed, contending that no pre-final decree entered should have been awarded to either party.[6] It also pointed out that a decision in its favor on the cross-appeal, *i.e.* that no interest should be allowed to either party in a mutual fault case prior to final decree, would make it unnecessary for the court to consider the question on which petitioner appealed, *i.e.* whether the United States must be limited to 4 per cent pre-final decree interest on its damages because the Suits in Admiralty Act limits

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[5] The intervening cargo claimants (*supra*, p. 4, note 3) were awarded their full cargo damages of $50,026.99 as against the United States together with interest at 4 per cent from the date of entry of the final decree (R. 66).

[6] While the district court refused to pass on this question because of the language of the interlocutory decree on mandate, there was no doubt that the court of appeals was not precluded from deciding whether pre-final decree interest should not have been allowed. Petitioner conceded in that court "the propriety of the [Government's] appeal" on that question. Reply Brief for Canadian Aviator, Ltd., filed in the court below in the instant case, at p. 1.

petitioner to 4 per cent pre-final decree interest on its damages.[7]

The Court of Appeals held *per curiam* that no interest should have been allowed to either party "for the period prior to the entry of the final decree striking a balance in favor of the party that sustained the greater damages" (R. 76). There accordingly was no occasion for it to pass on the question of dissimilar interest rates for the period prior to the final decree.

ARGUMENT

The decision of the court below, holding that neither petitioner nor the United States are entitled to pre-final decree interest in this case, is correct and in accord with established principles. There is no conflict, and further review by this Court is not warranted.

1. The general rule that interest in a common law tort action does not begin to run until date of judgment because until then the sum payable by defendant has not been ascertained is not challenged by petitioner. It argues, however, for a different rule in mutual fault cases in admiralty. But that contention overlooks the fact that the identical considerations which underlie the general prohibition

[7] The question of dissimilar interest rates can never arise in a mutual fault case where pre-final decree interest is not allowed. If interest is allowed on only the balance struck by the final decree in favor of the party sustaining the greatest damages, it is obvious that the successful party alone will be entitled to interest.

against interest before judgment are fully applicable to the instant mutual fault collision.

a. In a mutual fault case the libel and cross-libel constitute a single suit and give rise to but one liability.[8] *Bowker* v. *The United States,* 186 U. S. 135; *The North Star,* 106 U. S. 17. There is no certainty as to the amount which will have to be paid nor even as to the party who will have to make that payment until the balance is struck. Thus, in *The North Star,* after concluding that cross-claims form a single litigation so as to give rise only to a single liability for the excess of the damages of one vessel over those of the other, the Court stated (106 U. S. 17, 22):

> These authorities conclusively show that, according to the general maritime law, in cases of collision occurring by the fault of both parties, the entire damage to both ships is added together in one common mass and equally divided between them, and *thereupon arises a liability of one party to pay* to the other such sum as is necessary to equalize the burden. This is the rule of mutual liability between the parties. [Emphasis supplied.]

Since cross-libels in a both-to-blame collision give rise to a single liability which is not ascertainable until damages are divided and a balance struck, the situation is "like a bill for an account,

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[8] In accordance with this principle, the present cases were consolidated and only one decree entered (R. 31-32).

which imports an offer to pay the balance" due. *The Thekla,* 266 U. S. 328, 340. In such circumstances, interest obviously is improper "until," as pointed out by the court below, "it can be found which party is withholding a balance" (R. 76). Allowance of interest, of course, may be justified only "as damages for the detention of money or of property, or of compensation, to which the plaintiff is entitled." *United States* v. *North Carolina,* 136 U.S. 211, 216. It follows, therefore, that interest may not be allowed prior to entry of a final decree in a both-to-blame case because until such time the damages are necessarily unliquidated and it is impossible to ascertain which of the parties is liable and which is entitled to payment. The party ultimately held liable cannot be regarded as having improperly delayed payment.

b. The decision of the court below, based on the considerations set forth above, is in full accord with its own prior decisions, with those of other courts of appeals in mutual fault cases, and with those of this Court in related cases.

In *The Wright,* 109 F. 2d 699, the court below held, as it did in the instant case, that until a final decree is entered in a mutual fault case, thereby striking a balance due, no interest is payable. Petitioner contends that *The Wright* is distinguishable because it arose "under the Public Vessels Act which expressly denies interest to the private shipowner prior to final decree" (Pet. 14). But, as

observed by the court below in the instant case arising under the Suits in Admiralty Act, *The Wright* "proceeded upon no such" distinction (R. 76). The decisions in both the instant case and in *The Wright* were instead based on the general and "broader" ground prohibiting "the award of interest prior to decree to either party where damages are divided as a result of joint fault." *The Wright,* 109 F. 2d 699, 702.

This reasoning has led to the same holdings in other mutual fault cases in the Fifth and Ninth Circuits. Thus, in *Kawasaki Zosensho* v. *Cosulich Societa Triestina Di Navigazione,* 11 F. 2d 836 (C.A. 5), certiorari denied, 265 U.S. 581, the damages were divided but the district court allowed one of the litigants interest from the date of the collision rather than the date of the entry of final decree. In reversing, the Court of Appeals for the Fifth Circuit pointed to the fact that the claim of each ship against the other had not been liquidated but in serious and good faith insisted upon and opposed. It accordingly directed that interest should be calculated only from the date of the final decree which liquidated all of the claims. Again, in *The Itasca,* 117 Fed. 885, 892 (S.D. Ga.), another mutual fault case, the court reiterated the general rule that in both-to-blame situations, where the amount, proportion and extent of respective fault must be determined by judicial proceedings,

interest cannot be charged for the period covered by such proceedings. The court in that case therefore directed interest to be allowed to start to run only from the date of the final decree. And again, in *The Tremont,* 160 Fed. 1016 (W.D. Wash.), still another mutual fault case, interest prior to final decree was disallowed. Each of these cases simply reflect the general rule that where the damages are uncertain and in need of proof, interest may be allowed only from the date when they are liquidated, that is, when they are fixed by judicial ascertainment. Cf. *The Mary B. Curtis,* 250 Fed. 9 (C.A. 5).[9]

Similar considerations have been invoked regularly by the courts in denying pre-decree interest in other fields. For example, in patent infringement accounting cases, this Court has uniformly denied interest prior to judicial ascertainment of damages. *Mowry* v. *Whitney,* 14 Wall. 620, 653; *Tilghman* v. *Proctor,* 125 U.S. 136, 161; *Crosby Valve Co.* v. *Safety Valve Co.,* 141 U.S. 441, 457-

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[9] Petitioner's reliance (Pet. 6-7) on *The Manitoba,* 122 U.S. 97, as supporting a different view, is misplaced. While it is true that dictum in the opinion implies approval of interest on the vessel's damage prior to the date of the decree, it is significant that the case simply holds that, in a limitation proceeding, the shipowner's liability is limited to the value of his vessel *plus interest from the date of the decree and not prior to the entry of that decree.* 122 U.S. 97, 102, 111. Moreover, the Court in that case evidently did not have presented to it the considerations which militate against award of pre-decree interest. Like considerations have, as we show above (pp. 11-12) impelled the Court to deny pre-decree interest in related situations.

458; *Duplate Corp.* v. *Triplex Co.,* 298 U.S. 448, 459; see also *Gotham Silk Hosiery Co.* v. *Artcraft Silk Hosiery Mills, Inc.,* 147 F. 2d 209, 224 (C.A. 3).[10]

Any other result would subject the defendant to a penalty, in the form of interest, merely because he contests a claim in good faith and insists on having his rights determined by a court. *Ogden* v. *Stevens,* 241 Ill. 556, 561, 565-566; *Sargent* v. *American Bank & Trust Co.,* 80 Oreg. 16, 39-40. Over one hundred years ago it was pointed out in an admiralty action that where libellant's right of recovery as well as the balance due him were in dispute, no interest could be recovered before the court "had fixed the right of the recovery, and the report of the commissioners had liquidated the amount." *The Isaac Newton,* 13 Fed. Cas. 143, 146 (No. 7090; S.D.N.Y.). Prohibition of interest prior to such date is obviously necessary to avoid

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[10] The same principle has been applied in other actions for accounting, allowing interest only from the date of the judgment and not for any period prior thereto. *Lumbermen's Supply Co.* v. *Neal,* 189 Okla. 544. Likewise, in an accounting by a guardian to his wards, where it was unknown whether all or a portion of the money entrusted to him was to be returned to the wards, the amount thereof was considered to be undetermined or unliquidated until fixed by the decree. And, since an accounting was necessary to determine the amount due, the demand was necessarily unliquidated until the decree so that interest was not recoverable until that time. *In re Deming,* 192 Wash. 190, 229. For similar reasons, *Lovejoy* v. *Bailey,* 214 Mass. 134, 144, 157, an accounting action against partnership members, held that each of those members was entitled to interest only from the date of entry of the judgment.

the injustice of inflicting a penalty for defending a law suit.[11]

2. Petitioner also contends that since the Suits in Admiralty Act limits it to 4 per cent pre-decree interest as against the United States, it is inequitable to allow 6 per cent pre-decree interest to the United States as against petitioner (Pet. 19-23). But, since the court below properly decided that neither party is entitled to any pre-decree interest, there is no need to reach the question of dissimilar pre-decree interest rates. (See *supra,* pp. 6-7). Indeed, it was for that reason that the court below, as petitioner states, "did not mention the rate of interest question" (Pet. 19).

Even if it had been necessary for the court below to reach the question of dissimilar rates, we submit that an award of 6 per cent interest to the United States is in no way inconsistent with the 4 per cent award to the private shipowner in a mutual fault case. Petitioner's attempt to "equalize the rates at 4%" (Pet. 22) was rejected by this Court over

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[11] There can be no serious question as to the applicability of this principle to the facts here involved and the consequent need for denying pre-decree interest. Petitioner's damage claim consisted of 43 different items (R. 52). There was "serious controversy" as to various items (R. 52). Among those in dispute were the important items as to the cost of actual repairs, detention damages as determined by voyage accounts, and a claim of $42,500 for certain unrepaired damage. Moreover, the fact that the *Stanton* was ultimately held to be equally at blame has, of course, no bearing on the good faith of the Government's contesting liability on the part of the *Stanton* in an effort to have her completely exonerated.

fifty years ago in *United States* v. *Verdier,* 164 U.S. 213. The Court stated (164 U.S. 213, 218-219):

> An inherent vice of petitioner's argument is in the assumption that he and the government stand upon an equality with respect to interest. The truth is that in its dealings with individuals public policy demands that the government should occupy an apparently favored position.

The United States is therefore entitled to interest in an admiralty action even though such interest is denied to the private litigant. *United States* v. *Commonwealth & Dominion Line, Ltd.,* 278 U. S. 427.[12]

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[12] Nor does *The Comus,* 19 F. 2d 774 (C.A. 2) furnish any support to petitioner. On the contrary, it supports the Government's position on this phase of the case. The private shipowner sought "upon grounds of equity" to apply to the United States the same interest rate as was recoverable by it. But the court, stating that "the question is *not* one for the application of equitable principles," expressly awarded 6 per cent interest to the United States and 4 per cent to the private shipowner. 19 F. 2d 774, 777. A letter later written by Judge Manton and relied on by petitioner (Pet. 21), did not affect the court's express ruling. See *The Wright,* 109 F. 2d 699, 701 (C.A. 2).

CONCLUSION

The decision below is correct and there exists no conflict. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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Attorneys.

JUNE 1951.

APPENDIX

Section 3 of the Suits in Admiralty Act (Act of March 9, 1920, 41 Stat. 526, as amended, 46 U.S.C. 743) provides as follows:

> That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation heretofore given in admiralty causes by the United States or the United States Maritime Commission, shall become void and be surrendered and canceled

upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in section 8 of this Act.

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Supreme Court of the United States

October Term 1951
No. 50

CANADIAN AVIATOR LTD.,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent,

and

H. JASON JONES, et al.,
Intervenors.

PETITIONER'S REPLY BRIEF ON PETITION FOR CERTIORARI

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Dated: New York, N. Y., June 25, 1951.

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I. As to the allowance of any interest.

Respondent's argument misses the point. Respondent asserts that there is but one liability, which is not determined until the entry of final decree. No doubt the liability remaining after the balance is struck is single but the question remains, Do the damage items of the parties upon which that balance is calculated bear interest from the dates of collision or payment until the balance is struck?

The issue is not whether pre-decree interest is allowed only to the party from whom a balance has been withheld. Respondent does not deny that the allowance of pre-decree interest in both-to-blame cases has been to *both* parties on the same basis. Petitioner claims it should be so allowed in this case—see petition, appendix A, p. 24.

It is entirely erroneous to say, as respondent does (brief, p. 11), that this Court's decision in *The Manitoba*, 122 U. S. 97,

> "simply holds that, in a limitation proceeding, the shipowner's liability is limited to the value of his vessel *plus interest from the date of the decree and not prior to the entry of that decree.*"

This statement is wholly wrong.

This Court squarely held that the shipowners' damages included pre-decree interest. Before reaching the question of whether the MANITOBA's limitation of liability fund must include interest the Court had to determine the amount of the MANITOBA's liability to the COMET. Mr. Justice Blatchford, an experienced admiralty judge,* carefully calculated the arithmetic and, for the Court, concluded

> "That [$39,174.08] was the amount of the liability of the Manitoba to the Comet, at the date of the decree of the Circuit Court, on a division of the damages, after a proper allowance to the Manitoba for the damage to her, and without reference to the limitation of liability" (p. 111).

That figure, $39,174.08, included pre-decree interest—for a simple statement of the figures see appendix A to the petition pages 24-5.

If pre-decree interest had not been allowed by this Court on the damage items of both shipowners the question as to interest on the MANITOBA's limitation fund (which respondent says is the only question decided by this Court) would never have been reached because the balance payable

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* Mr. Justice Blatchford had substantial experience as a District Judge in the trial of admiralty cases and doubtless well knew the law and the practice in the assessing of damages in both-to-blame cases. See his memorial, 150 U. S. 707,711.

by the MANITOBA to the COMET without interest was less than the MANITOBA's limitation fund without interest.*

Respondent asserts that

> "* * * the general rule [is] that where the damages are uncertain and in need of proof, interest may be allowed only from the date when they are liquidated * * *" (brief p. 11).

The Court of Appeals did not rest its decision on any such supposed rule. Moreover, there is no such rule and respondent's citations do not support it. *Kawasaki Zosensho* v. *Cosulich Societa Triestina Di Navigazione,* 11 F. 2d 836 (C. A. 5), certiorari denied 265 U. S. 581, *The Tremont,* 160 Fed. 1016 (W. D. Wash.) and *The Mary B. Curtis,* 250 Fed. 9 (C. A. 5), cited by respondent, brief pp. 10-11, held that the general rule is to allow interest from the date of the collision, or payment of the bills, but may be refused in sound discretion if unusual facts require it. The cases cited at pages 5-14 of the petition establish that the allowance of interest is the rule rather than the exception in admiralty although the damages are invariably uncertain and in need of proof.

Respondent's assertion that "interest in a common law tort action does not begin to run until date of judgment"

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* COMET's damages without interest	$57,441.88
MANITOBA's damages without interest	5,000.00
Difference	$52,441.88
One-half the difference—payable by MANITOBA to COMET	$26,220.94

Since the MANITOBA's limitation fund without interest was $28,694.95, an amount greater than the MANITOBA's liability to the COMET calculated without interest, no question of limitation of liability arose unless pre-decree interest was allowed in calculating the balance payable.

(brief, p. 7) has no support in any recent case in which the damages were, as here, ascertainable, e.g. shipyard repair bills. The common law in fact has now progressed to the point where it is more liberal than the admiralty, for it is now debated whether in such cases it is not error as matter of law to deny interest, while formerly it was only the rule that interest was discretionary. 61 Harv. L. Rev. 113, 136-138. See *Sedgwick on Damages*, 9th Edition, §§ 316-324; *Sutherland on Damages*, 4th Edition, § 355.

The Court of Appeals was not prompted toward its decision by any thought that to allow interest would penalize the defense of a law suit, a new point suggested by respondent (brief, pp. 12-13). The Court of Appeals rested its decision upon the thought that interest should not start until there has been a determination as to which party is withholding a balance from the other. Despite respondent's footnote 11 it has been clear from the beginning of this case that the eventual balance would be due to petitioner. Surveys of the damaged vessels showed within a week of the collision that petitioner's damages would be upwards of $70,000 whereas respondent's damages would be less than $20,000. Respondent likewise had means of knowing from the beginning that it was a case of mutual fault. It is apparent from the decisions of both the District Court and the Court of Appeals on the merits* that respondent's vessel was held at fault on the basis of her own admissions. Less than six months after this collision occurred we offered to settle this case on the basis of both-to-blame but respondent declined (R. 56-8).

Such considerations sustain the District Court's allowance of pre-decree interest to both parties when it entered the interlocutory decree after trial (R. 31, f. 93). Similar considerations doubtless prompted respondent not to appeal from the allowance of interest when it took its first appeal.

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* 1945 A. M. C. 348 and 154 F. 2d 825.

II. As to the rate of interest.

None of the cases cited by respondent deals with the Suits in Admiralty Act, with its specific interest authorization. More importantly, none deals with the question here, the right *of the United States* to interest at a rate in excess of that awarded to the private party.

Respondent's attempt (brief, p. 14, footnote 12) to belittle "a letter later written by Judge Manton" in *The Comus,* 1927 A. M. C. 1713, falls before the record. The United States Attorney and we were proctors for the adverse parties in *The Comus.* We have examined our file in that matter, as the United States Attorney may examine his file. The fact is that final interest was calculated by both parties at 6% per annum, that the balance was struck on that basis, and the amount actually paid and received in satisfaction of the final decree was determined on the basis of 6% interest to both parties. Thus the actual effective *decision* of the Court of Appeals in *The Comus* was to put the private vessel owner on an equal basis in the matter of interest by allowing 6% although the Suits in Admiralty Act limits the rate to 4%.

Conclusion

The decision below is wrong and there exists serious conflict between it and the prior decisions of this Court and the Courts of Appeal and the District Courts in the maritime circuits. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be granted.

EUGENE UNDERWOOD,
Proctor for Petitioner.

Dated: June 25, 1951.